

APPEAL NO. 052188
FILED OCTOBER 28, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 22, 2005. The only issue before the hearing officer was "Is the [Independent Review Organization (IRO)] decision supported by a preponderance of the evidence?" With regard to that issue the hearing officer determined that the appellant's (claimant) compensable injury of _____, does not include urinary incontinence or herniation at L5-S1 and that the IRO decision was supported by a preponderance of the evidence.

The claimant appealed, contending that the documented evidence supports the necessity of the requested spinal surgery and that the hearing officer's determinations regarding incontinence and disc herniations amounted to an impermissible addition of an extent-of-injury issue which was beyond the sole issue before him. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable lumbar injury on _____. In evidence is a Benefit Dispute Agreement (TWCC-24) dated October 2003 whereby the "parties agree the claimant's compensable injury extends to and includes her lumbar spine." There was apparently no further effort to define the extent of the compensable injury. The claimant contends that "the carrier had never contested the nature and extent of the lumbar spine injury."

The IRO decision, dated July 22, 2005, upheld the denial of the requested surgical procedure "as the current clinical history is inconsistent with clinical picture clearly documented for several months after her injury." The IRO cited certain inconsistencies such as early complaints being of the right sacroiliac area and only later were left sciatica complaints noted. An MRI was interpreted differently by the doctors and the IRO concluded that the "MRI study does not reveal a surgical lesion." The IRO concluded that the requested surgery is inconsistent with accepted standards. There were conflicting medical opinions on whether the claimant had a disc herniation or merely a bulge. The IRO decision, and the hearing officer's decision on the only issue before him, being whether the IRO decision was supported by a preponderance of the evidence, is supported by the evidence. The hearing officer's decision on this issue is affirmed.

The hearing officer at the CCH recognized that the extent of the compensable injury had not been fully delineated and asked "Do I have to make an extent of injury determination with respect [inaudible] to the IRO?" The carrier replied "yeah, it seems like you would" and requests addition of an issue of whether the compensable injury

includes disc herniation at L5-S1, or whether the compensable injury includes findings of the MRI. The claimant objected, stating that the hearing officer was not required to make an extent-of-injury determination but that the hearing officer had to determine if the medical records were sufficient to support the IRO decision.

The hearing officer in the discussion portion of his decision comments that the claimant “failed to establish that her compensable injury included urinary incontinence” and that “[h]erniation at [L5-S1] has not been established, nor is the medical [evidence] consistent in its conclusion about the level of the pain generator.” The hearing officer made specific determinations that the lumbar injury does not include urinary incontinence, does not include herniation at L5-S1, and that the L5-S1 “pain generator was not reasonably established.” The claimant’s appeal “objects to the superfluous findings” We agree.

The only issue before the hearing officer was whether the IRO decision was supported by a preponderance of the evidence, not whether the claimant had a burden to establish causation for any urinary incontinence, or whether the disc bulge at L5-S1 was a herniation or what the claimant’s pain generator was. Those may have been factors for the IRO to consider but do not warrant specific determinations by the hearing officer on an extent-of-injury issue. We agree that the nature and extent of injury should have been resolved prior to going to the IRO. In this regard we note that 28 TEX. ADMIN. CODE § 133.308 (Rule 133.308) entitled “Medical Dispute Resolution by [IROs]” in Rule 133.308(f)(7) provides that:

(7) if the carrier has raised a dispute pertaining to liability for the claim, compensability, or extent of injury, in accordance with § 124.2 of this title (relating to Carrier Reporting and Notification Requirements), the request for an IRO will be held in abeyance until those disputes have been resolved by a final decision of the commission [Texas Department of Insurance, Division of Workers’ Compensation].

In Appeals Panel Decision (APD) 030805 decided May 15, 2003, the Appeals Panel held that it does not read Rule 133.308(f)(7) as creating a carrier waiver. By the same token APD 030805 did have an extent-of-injury issue where this case does not. The hearing officer at the CCH asked if he had to make an extent-of-injury determination to resolve the case. The carrier said yes while the claimant said no. Rule 142.7 provides how issues may be added. Certainly there was no unanimous consent of the parties to add an extent-of-injury issue and the record indicates no basis for the hearing officer to find good cause to add such an issue.

The IRO decision is a doctor’s opinion in ruling whether spinal surgery is reasonable and necessary based on the medical records. An extent-of-injury issue is not determined by the spinal surgery preauthorization process. The hearing officer erred in making determinations that the compensable injury does not include urinary incontinence, does not include herniation at L5-S1, and that L5-S1 as the pain generator was not reasonably established, thereby exceeding the scope of the issue

before him. See APD 990164 decided March 15, 1999. We reverse the hearing officer's decision that the compensable injury does not include urinary incontinence, does not include herniation at L5-S1, and that L5-S1 as the pain generator was not reasonably established. We render a new decision striking Findings of Fact Nos. 5, 6 and 7, Conclusion of Law No. 4, and so much of the decision portion which states that the claimant's compensable injury of _____, does not include urinary incontinence or herniation at L5-S1.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge